WA 246/2003
BEFORE
HON'BLE THE CHIEF JUSTICE MR BS REDDY
HON'BLE MR JUSTICE HRISHIKESH ROY

JUDGMENT AND ORDER (ORAL)

(BS Reddy,CJ)

This writ appeal, at the instance of the 4th respondent in the writ petition, is directed against the judgment and order dated 3-3-2003 made in Civil Rule No.540/1994 by a learned Single Judge of this court.

2. In order to consider as to whether the judgment and order under appeal suffers from any infirmities requiring our interference, few relevant facts leading to filing of this writ appeal may have to be noticed.

The respondent/writ petitioner filed the Civil Rule with a prayer to quash the impugned order dated 9-11-1993 (Annexure-4) issued by the Inspector of Schools, DDC, Dhubri whereunder and whereby the appellant herein had been appointed as a Science Graduate Teacher in Kukurmara HS School.

The 2nd respondent Director of Secondary Education, Assam issued an advertisement inviting applications from all eligible candidates for filling up the posts of Graduate Science Teachers in secondary schools for the year 1991-92. The writ petitioner submitted his application pursuant to this advertisement. The appellant (4th respondent in the writ petition) who was admittedly not a science graduate on the date of making application was however appointed as a Science Graduate Teacher in the said school. It is under those circumstances the writ petitioner invoked the extraordinary jurisdiction of this court under Article 226 of the Constitution of India challenging the selection and appointment of the appellant herein on various grounds. The challenge to the selection and appointment of the appellant herein is made mainly on two folds, namely, that the case of the appellant for selection and appointment ought not to have been considered at all since he was not qualified, even to submit his application, as he was not a science graduate on the last date fixed for submitting the applications and also on the ground that the authorities could not have denied the right of the writ petitioner to participate in the process of selection.

3. The Inspector of Schools, DDC, Dhubri filed a detailed affidavit-in-opposition not only on his behalf but also on behalf of respondents Nos.1 and 2, namely, the State of Assam and the Director of Secondary Education, Assam. In the affidavit-in-opposition it is, inter alia, pleaded that on 2-11-1993 the Board adopted resolution to the effect that such of those candidates who had applied for the posts of Science Graduate Teachers and appeared in the interview before the declaration of results of final examination were also eligible for selection and appointment provided they have in the meanwhile qualified themselves for such appointment. It is on the basis of the said resolution the appellant herein was allowed to participate in the process of selection and in the selection so made he was found to be comparatively meritorious as against all those who participated in the selection and appointment order was accordingly issued. It is also pleaded that such of those science graduates who have already been selected for ME/MV schools under the District Elementary Education Officer, Dhubri are not entitled for consideration for appointment to the posts of Science Graduate Teachers in Secondary schools inasmuch as both the posts are of same cadre and same scale of pay. It was contended that since the writ petitioner was already selected and appointed as Science Graduate Teacher at Porarchar MV School in Dhubri district, his case was not considered for selection and appointment as Science Graduate Teacher in Secondary Schools.

4. Be it noted, the appellant herein despite having been served with the notices did not participate nor entered any appearance in the writ petition.

5. The learned Single Judge after hearing the counsel for the writ petitioner and as well as the respondents Nos.1, 2 and 3 and after an elaborate consideration of the matter allowed the writ petition setting aside the selection and appointment of the appellant and quashed the impugned order dated 9-11-1993 appointing the appellant herein as Science Graduate Teacher in Kukurmara HS School. The learned Single Judge took the view that the resolution passed by the Board had the effect of qualifying the appellant herein for selection 'with retrospective effect'. It was found that the resolution adopted by the Board is not supported by any reason whatsoever. The learned Judge accordingly held that the appellant herein was not eligible for submitting his application as on 20-9-1991, as he was not even a science graduate on that day, which is one of the essential and basic qualifications prescribed for the posts in question.

6. Being aggrieved by the judgment and order of the learned Single Judge the 4th respondent in the writ petition has preferred this writ appeal challenging the correctness of the judgment. The learned counsel for the appellant strenuously contended that the appellant herein, though did not complete his graduation in science as on 20-9-1991, passed the examination by the time the interviews were scheduled to take place, i.e. 24-11-1991. The resolution passed by the Board, it is contended, does not suffer from any infirmity whatsoever.

7. There is no dispute whatsoever that as on 20-9-1991, the last date of submitting the application forms, the appellant herein was not a graduate in science. Equally there is no dispute at the Bar that he passed the examination and obtained his graduate degree by 24-11-1991, the date on which interviews were held for selection to the posts of Science Graduate Teachers. The fact remains that the appellant herein was not even qualified to apply for such selection. The appellant was allowed to participate in the process of selection on the strength of the resolution dated 2-11-1993 passed by the Board which is to the following effect :-

> & it is resolved that the candidates who have applied and appeared in the interview before declaration of final examination results are also eligible for selection and appointment provided they have subsequently qualified themselves for such appointment.

8. The learned counsel for the appellant relying on the judgment of the Supreme Court in Ashok Kumar Sharma & Anr vs. Chander Shekher & Anr submitted that the resolution passed by the Board, under which the appellant got himself qualified, does not suffer from any legal infirmity inasmuch as such a course was open to the employer to permit and entertain applications of such of those candidates who did not possess the requisite educational qualifications on the date of application but acquired the same as on the date of interview. The Apex Court in Ashok Kumar Sharma1 posed the question for its consideration as to whether or not candidates who were fully qualified to be appointed as Junior engineers on the dates of interview, but whose results had not been declared on the dates of submission of their applications, were entitled to be considered for appointment to the post of Junior Engineer. If the answer is in the affirmative, the appellants who had become qualified on the dates of interview and had admittedly acquired higher marks in the interview were rightly appointed as Junior Engineers on the basis of their merits and were rightly promoted to the post of Assistant Engineer by reason of seniority in preference to the respondents who were also appointed as Junior Engineers and subsequently promoted, but placed junior to the appellants. The Apex Court mainly relying on Rule 37 of J & K Public Service Commission Business Rules held that the principle of Rule 37 is by analogy applicable to the fact situation on hand. The court accordingly held :-

> The fact is that the appellants did pass the examination and were fully qualified for being selected prior to the date of interview. By allowing the appellants to sit for the interview and by their selection on the basis of their comparative merits, the recruiting authority was able to get the best talents available.

It was certainly in the public interest that the interview was made as broad bas ed as was possible on the basis of qualification. The reasoning of the learned S ingle Judge was thus based on sound principle with reference to comparatively su perior merits. It was in the public interest that better candidates who were ful ly qualified on the dates of selection were not rejected, notwithstanding that t he results of the examination in which they had appeared had been delayed for no fault of theirs. The appellants were fully qualified on the dates of the interv iew and taking into account the generally followed principle of Rule 37 in the S tate of Jammu & Kashmir, we are of opinion that the technical view adopted by th e learned Judges of the Division Bench was incorrect and the view expressed by t he learned Single Judge was, on the facts of this case, the correct view. Accord ingly, we set aside the impugned judgment of the Division Bench and restore that of the learned Single Judge. In the result, we uphold the results announced by the recruiting authority. The appeal is allowed in the above terms. However, we make no order as to costs.

9. Be it noted, two review applications filed by the respondents in the very same cases came up for consideration in Ashok Kumar Sharma & Ors vs. C hander Shekhar & Anr wherein the Apex Court held that the majority judgment in A shok Kumar Sharma1 is unsustainable in law . The court accordingly declared that there is no reason to deviate from the established proposition that where a pplications are called for prescribing a particular date as the last date for fi ling the applications, the eligibility of the candidates shall have to be judged with reference to that and that date alone. A person who acquires the prescribe d qualification subsequent to such prescribed date cannot be considered at all. An advertisement or notification issued/published calling for applications const itutes a representation to the public and the authority issuing it is bound by s uch representation. It cannot act contrary to it. One reason behind this proposi tion is that if it were known that persons who obtained the qualifications after the prescribed date but before the date of interview would be allowed to appear for the interview, other similarly placed persons could also have applied. Just because some of the persons had applied notwithstanding that they had not acqui red the prescribed qualifications by the prescribed date, they could not have be en treated on a preferential basis. Their applications ought to have been reject ed at the inception itself.

10. In such view of the matter we have no option but to declare that the resolution of the Board dated 2-11-1993 is clearly unsustainable being ille gal. The appellant admittedly was not qualified even to apply for the said post as on 20-9-1991 being the last date of submitting the applications since he was not a science graduate and that lacks the basic qualification. We are in complet e agreement with the view taken by the learned Single Judge in this regard.

11. But the question that falls for our consideration is whether the writ petitioner is entitled to grant of any relief ? Whether the selection and appointment of the appellant herein as the Science Graduate Teacher is required to be set aside at this point of time ? This is required to be considered in the light of the background that the appellant herein was appointed as Science Grad uate Teacher vide the impugned proceedings dated 9-11-1993. The writ petitioner filed the Civil Rule in February, 1994. The court refused to grant interim order s as prayed for but observed that the selection and appointment of the appellant herein shall be subject to the result of the writ petition. The writ petition i tself stood disposed of after 4 years of filing of the writ petition. The appell ant continues to be in service ever since 1993, i.e. for a period of more than 1 3 years. The appellant herein may not be entitled strictly under law to continue as the Science Graduate Teacher since he was not eligible even to apply for the said post as he was not possessing the basic educational qualification as on th e last date of application. But it is required to be noted that he acquired the qualification by the time the interviews were held. On equitable consideration w e hold that it will be wholly unjust to interfere with the order of appointment

after a long lapse of 13 years. It is not as if the writ petitioner would get any relief in the event of this court interfering with the order of appointment of the appellant. We are not inclined to exercise our discretion under Article 226 of the Constitution of India and grant any relief to the writ petitioner though a case has been made out for setting aside the appointment of the appellant.

12. The learned counsel for the respondent/writ petitioner relying on the decision of this court reported in Devika Kumbang & Ors vs. State of Assam & Ors contended that the court is left with no option except to set aside the appointment of the appellant once it is to be held that the appellant was not entitled to submit his application pursuant to the advertisement as he was not even qualified to submit the application and participate in the selection process. The decision, in our considered opinion, in no manner supports the extreme submission of the learned counsel for the respondent/writ petitioner. The facts as evident from the judgment in Devika Kumbang3 are so glaring leading to the conclusion by the learned Judge that the entire process leading to the appointment of the petitioners therein were undoubtedly unfair, unauthorized and illegal. The appointment letters had been issued by the Director of Elementary Education, Govt of Assam just on the eve of his retirement and some appointment letters were also issued even after his retirement on back date. Some of the appointment letters were even found to be fake. The appointments were made into posts which were never sanctioned. We fail to appreciate as to how the said judgment would lend any support to the case set up by the writ petitioners.

13. For all the aforesaid reasons we are not inclined to interfere with the order of appointment dated 9-11-1993 and grant any relief to the writ petitioner. We accordingly dismiss the writ petition.

14. The writ appeal is accordingly allowed without any order as to costs.

JUDGE CHIEF JUSTICE

Mazumdar/